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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 377

THE UNITED STATES,

Petitioner,

v.

WILLIAM WINTERS and JOHN T. PAYNE, co-partners doing business under the firm name and style of WILLIAM WINTERS & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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Opinion Below

The opinion of the Court of Claims (R. 39-45) is reported at 84 F. Supp. 756.

Jurisdiction

The judgment of the Court of Claims was entered July 11, 1949 (R. 67). The petition for a writ of certiorari was

filed October 7, 1949 and notice thereof together with a Transcript of Record was served upon respondents on November 3, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. §1255.

Question Presented

The only question presented by the petition for writ of certiorari is:

Assuming, as the Court of Claims does, that a first contract binding upon respondents resulted from a given set of events, does the Court's decision that all rights and liabilities thereunder were superseded and waived when respondents and the Government entered into a second contract covering the same subject matter, but for a different price and with an additional guaranty of performance by a surety, "violate basic principles of contract law," "conflict with decisions of the Court of Appeals for the First Circuit," or contravene "practices established for a long period of years by the financial officers of the Government?"

Outline of the Case

This was a suit against the United States on a contract. The facts are briefly as follows: On February 8, 1941, the Government invited bids for the clearing and grubbing of certain acreage near Homestead, Florida, as a part of the construction of an airport (R. 32). Respondents submitted the low bid, but it was so low that respondents were unable to procure the performance and

payment bonds required by the Government and as a consequence never executed a definitive contract (R. 35).*

The Government then readvertised the identical work covered by its first invitation and in response thereto respondents submitted a new and higher bid. Pursuant to this second bid, respondents secured performance and payment bonds and a formal, definitive contract was executed by respondents and the Government under date of April 11, 1941 (R. 36). Respondents satisfactorily completed the contract (R. 38), but the Government refused to pay respondents the full contract price (R. 38).

Upon special findings of fact, the Court of Claims held that, even assuming a contract arose out of the first set of events occurring prior to the execution of the concededly valid contract of April 11, 1941, all rights and liabilities under such first contract were superseded and waived when respondents and the Government entered into the second contract of April 11, 1941, covering the same subject matter but for a different price and with the additional guaranty of performance by a third party.

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* The Government has never contended nor do the findings of fact or decision by the Court below in any way indicate that respondents' actions were fraudulent or even constituted "sharp practice" (R. 41). In fact, even though their efforts met with eventual failure, respondents went so far as to request and obtain an extension of time in which to renew their attempts to produce the required performance and payment bonds at the time of the first invitation (R. 35).

ARGUMENT

I

The decision of the Court of Claims can scarcely be said to "violate basic principles of contract law" since it rests squarely upon a decision of this Court.

The instant case is the exact reverse of the situation presented in *United States ex rel. International Contracting Company* v. *Lamont,* 155 U. S. 303. In that case it was assumed that the Government and International had entered into a valid contract to do certain dredging work at 19.7 cents per cubic yard. Refusing to permit performance under this first contract, the Government readvertised and International bid again, this time at a lower price of 13.7 cents per cubic yard. The Government awarded International a second contract pursuant to its second bid. The work was performed and the lower price paid. International failed in its attempt to make the first contract (and the higher price) stand, for the Court held that any rights and liabilities flowing from the first contract were waived and superseded by the execution of the second contract between the same parties covering the same subject matter but containing an inconsistent term—that of price.

In the light of the *Lamont* case, it is inconceivable that the Government may reap the benefit of a lower price in a second contract covering the same subject matter but not be bound by a higher price in a second contract, especially when, as in the instant case, it also receives along with the second contract the additional guaranty of a third party. As the Court of Claims puts it in referring to the *Lamont* case:

> "If that is the law when it works to the advantage of the Government, it is the law when it works to the advantage of the citizen" (R. 45).

The citations by the Government to the effect that a binding agreement is consummated when a bid is accepted by the United States (although a formal contract is not executed) and further, that the usual rule is to measure damages by the additional cost to the Government in completing a contract (Br. for Petitioner, 7) are not in point.

In the first place, the decision of the Court of Claims assumes a first contract. Secondly, the question is not, as the Government's "Question Presented" would indicate (Br. for Petitioner, 2) a question of what the Government might be entitled to recover in damages if, with an initially similar set of events, it had chosen or been forced to let the contract to a second and different contractor at a higher price. What makes this case "unique", as the Court of Claims put it (R. 41) is that the Government did exactly the opposite—*i.e.*, it entered into a second contract with respondents covering the same subject matter but at a different price. The *Lamont* case, *supra,* is authority that in such an event the second contract completely supersedes all rights and liabilities under the first contract.

II

The decision of the Court of Claims is not in "direct conflict with decisions of the Court of Appeals for the First Circuit."

In asserting this so-called direct conflict with decisions of the Court of Appeals for the First Circuit, the Government is apparently relying on the case of *United States* v. *Conti,* 119 F. (2d) 652 (Br. for Petitioner 7, 9, 11). The facts in that case parallel those of the instant case pre-

cisely to the point where there has been a default on the part of the lowest bidder in the first round of bidding for a Government contract. But the parallel ceases at the very point where the question at issue here begins, for the defendant in the *Conti* case never made a bid on the re-letting nor entered into a second contract with the Government covering the same subject matter. The instant case involves solely the effect and consequences of the Government's permitting respondents to bid upon the re-letting and then, when respondents were again the successful bidders, proceeding to enter into a contract with them covering exactly the same subject matter but at a different price.

III

The decision of the Court of Claims does not contravene "practices established for a long period of years by the financial officers of the Government."

The instant case, as the Court of Claims has pointed out, is "unique." It is doubted that it has ever been "established practice" for the Government to contract, after a readvertisement and a second round of bidding, with the very same party who, because he could not produce acceptable performance and payment bonds, was not permitted to proceed with a contract awarded him following the first round of bidding.

In any event, no harm of any consequence can be occasioned the Government by the Court's decision below inasmuch as no door need be opened to sharp practice by bidders in any subsequent situation. The Government could uniformly treat a bidder who defaults, whether in good faith or bad, as ineligible for a contract on the second round of bidding. Also, the Government could insist upon a much more substantial bid bond—one which would

adequately cover not only the overhead and cost of re-letting a contract, but also approximate, at least, the estimated loss to the Government if the work must be performed by another party at a higher price. Either method (or both used in conjunction, perhaps) would be consistent with established contracting practices and foreclose the possibility of the Government's suffering a consequential loss. On the other hand, to reverse the equitable result which the Court of Claims reached would not only be unfair to respondents but would also permit innocent guarantors of performance to be misled into the belief that they were guaranteeing performance of a contract at the price stated therein rather than, in effect, at a price stated in a previously proffered contract which was so inadequate that no guarantor of performance could be obtained therefor.

CONCLUSION

The decision of the Court of Claims below is correctly rested upon a decision of this Court, in no way conflicts with applicable decisions of the Court of Appeals, First Circuit, and does not, or need not, upset established Government contracting practices. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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